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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

GASPER ABBATE III,

Petitioner,

v.

MICHAEL MARTEL, Warden,

Respondent.

No. C 11-1551 RS (PR)

ORDER OF DISMISSAL

INTRODUCTION

This is a federal habeas corpus action filed pursuant to 28 U.S.C. § 2254 by a *pro se* state prisoner. For the reasons discussed herein, respondent's motion to dismiss the petition as untimely (Docket No. 12) is GRANTED. The petition is DISMISSED.

DISCUSSION

A. Standard of Review

Federal habeas petitions must be filed within one year of the latest of the date on which: (1) the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (2) an impediment to filing an application created by

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1 unconstitutional state action was removed, if such action prevented petitioner from filing; (3)
2 the constitutional right asserted was recognized by the Supreme Court, if the right was newly
3 recognized by the Supreme Court and made retroactive to cases on collateral review; or (4)
4 the factual predicate of the claim could have been discovered through the exercise of due
5 diligence. *See* 28 U.S.C. § 2244(d)(1). “[W]hen a petitioner fails to seek a writ of certiorari
6 from the United States Supreme Court, the AEDPA’s one-year limitations period begins to
7 run on the date the ninety-day period defined by Supreme Court Rule 13 expires.” *Bowen v.*
8 *Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).

9 **B. Timeliness of the Petition**

10 The following facts are undisputed. Petitioner was sentenced on February 26, 1998 in
11 the Alameda County Superior Court. The state appellate court affirmed his conviction on
12 August 25, 1999. The state supreme court denied his petition for review on November 10,
13 1999. Therefore, petitioner had until February 8, 2001, that is, one year and ninety days from
14 the date the state supreme court denied his petition for review, to file a timely federal habeas
15 petition. The instant petition was filed on March 30, 2011, well after the February 8, 2001
16 deadline. On this record, absent tolling, the petition is barred by AEDPA’s statute of
17 limitations.

18 **1. Statutory and Equitable Tolling**

19 Petitioner alleges that he is entitled to statutory tolling of the filing deadline because
20 he was pursuing his state court remedies. The record does not support such a conclusion. He
21 contends that he filed his first state habeas petition on September 28, 2004, while respondent
22 contends that he filed his first state habeas petition on June 13, 2005. Under either filing
23 date, petitioner is not entitled to statutory tolling. A state habeas petition filed after
24 AEDPA’s statute of limitations ended, here February 9, 2001, cannot toll the limitation
25 period. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003). Section 2244(d)(2)
26 cannot “revive” the limitation period once it has run (i.e., restart the clock to zero); it can
27 only serve to pause a clock that has not yet fully run. “Once the limitations period is expired,
28

1 collateral petitions can no longer serve to avoid the statute of limitations.” *Rashid v.*
2 *Kuhlmann*, 991 F. Supp. 254, 259 (S.D.N.Y. 1998). Because petitioner filed his first state
3 habeas petition after the filing date for a federal habeas petition, he is not entitled to statutory
4 tolling on these grounds.

5 Petitioner also contends that he is entitled to statutory tolling on a separate ground, as
6 well as to equitable tolling. Petitioner claims he is entitled to statutory tolling under 28
7 U.S.C. § 2244(d)(1)(D) because, despite his exercise of due diligence, he did not become
8 aware until 2009 of the factual predicate of his claim, that is, (1) the name of a police tipster
9 involved in his case, Juanita Deltoro, and (2) that a relation of his, Rubio, had telephoned
10 petitioner around the time of the offenses. Petitioner contends that his counsel was
11 ineffective in investigating such information, and perhaps mounting a defense based on it.

12 Petitioner uses this same purported factual predicate as the basis for his assertion that
13 he is entitled to equitable tolling. A petitioner is entitled to equitable tolling “only if he
14 shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
15 circumstance stood in his way’ and prevented timely filing.” *Holland v. Florida*, 130 S. Ct.
16 2549, 2554 (2010) at 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408 (2005)); *Miles v.*
17 *Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (“When external forces, rather than a
18 petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling
19 of the statute of limitations may be appropriate.”)

20 The state habeas courts rejected petitioner’s claims of due diligence and judged his
21 2009-filed as well as subsequent petitions as being untimely:

22 A review of the record reveals that [p]etitioner knew of all the witnesses to
23 whom he refers in the [p]etition at the time of trial, and apparently disagreed
24 with his attorney as to the importance of the witnesses. . . . The record is clear
25 that since 1997 [petitioner] indicated that he felt Rubio and Deltoro were key
26 witnesses, and Rubio is a relative of [petitioner’s], but fails to explain why he
27 did not attempt to communicate with her himself prior to 2004. . . . He also
28 fails to offer any explanation as to why he waited until 2009 to file the
[p]etition when he had all the triggering information as of 2002. As to Rubio’s
latest declaration, [petitioner] fails to explain why he did not seek a more
detailed declaration sometime in 2002, shortly after he realized that his
appellate counsel would not be [pursuing] the habeas for him. Moreover, he
also fails to explain why, after receiving Rubio’s 2004 declaration wherein she
indicated that she had spoken to him on the telephone, he did not seek a more

1 detailed explanation and why he did not pose specific questions for her then.
 2 Not only should [petitioner have] been aware of those facts since it is alleged
 3 that it was to him that she had spoken, but he also had his suspicions about
 4 Deltoro. A delay of about seven years to file the [p]etition is substantial,
 especially in light of the fact that [petitioner] was aware of the triggering facts
 since before his trial. Nor do these allegations constitute good cause for the
 substantial delay in bringing the claim. Therefore the [p]etition is untimely.

5 (Mot. to Dismiss (“MTD”), Ex. F at 7–8.)

6 Based on this record, petitioner has not shown that the factual predicate could not
 7 have been found through the exercise of due diligence. Rather, the record shows that
 8 petitioner knew of these facts at the time of trial. On such facts, the Court concludes that
 9 petitioner has not shown due diligence, nor has he shown that external circumstances stood in
 10 his way and prevented timely filing. Also, his lack of legal knowledge is not a sufficient
 11 basis to establish equitable tolling. *See Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir.
 12 2006). Accordingly, he is not entitled to statutory or equitable tolling. Respondent’s motion
 13 to dismiss is GRANTED.

14 **2. Actual Innocence**


15 Petitioner’s assertion that he is actually innocent — and therefore AEDPA’s filing
 16 deadline is excused in his case — is unavailing. Petitioner has not shown that it is more
 17 likely than not that “no reasonable juror would have convicted him,” *Schlup v. Delo*, 513
 18 U.S. 298, 327 (1995), or that “every juror would have voted to acquit him,” *Lee v. Lampert*,
 19 653 F.3d 929, 946 (9th Cir. 2011) (en banc) (citing *Schlup*, 513 U.S. at 327) (Kozinski, J.
 20 concurring). Petitioner, rather than providing evidence of his actual innocence, gives
 21 conclusory statements: “the state of the evidence in this case is incomplete due to trial
 22 counsel’s constitutionally offensive performance.” (Pet.’s Opp. to MTD at 11.) Even if one
 23 takes into account petitioner’s allegations regarding Deltoro and Rubio, petitioner has not
 24 shown how such evidence, judged along with all other available evidence, entitles him to an
 25 actual innocence exception to AEDPA’s filing deadline. On such a record, respondent’s
 26 motion to dismiss is GRANTED.

CONCLUSION

For the reasons stated above, respondent's motion to dismiss the petition as untimely (Docket No. 12) is GRANTED. Accordingly, the petition is DISMISSED. Judgment will be entered in favor of respondent. A certificate of appealability will not issue. Petitioner has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Clerk shall enter judgment in favor of respondent, terminate Docket No. 12, and close the file.

IT IS SO ORDERED.

DATED: May 11, 2012


RICHARD SEEBORG
United States District Judge